



1111 19th Street NW > Suite 402 > Washington, DC 20036
t 202.872.5955 f 202.872.9354 www.aham.org

April 8, 2015

Via E-mail

Ms. Monet Vela
Office of Environmental Health Hazard Assessment
P. O. Box 4010
Sacramento, California 95812-4010

P65Public.Comments@oehha.ca.gov

Re: *Proposed Repeal of Article 6 and Adoption of New Article 6 & Proposed Adoption of Section 25205 for Proposition 65 Clear and Reasonable Warnings*

Dear Ms. Vela:

The Association of Home Appliance Manufacturers (AHAM) would like to comment on a regulatory proposal by the Office of Environmental Health Hazard Assessment (OEHHA) that would modify substantially Proposition 65's warning requirements.¹ As currently formulated, this regulatory action would have unintended consequences that would result in consumer confusion, increased business compliance costs and uncertainty. In this letter, AHAM addresses several concerns with the regulatory proposal, chief among them the lead agency website and apparent change to an important existing warning method. Without substantial reformulation to align better with the Governor's stated reform goals, the NOPR should be withdrawn.

AHAM represents manufacturers of major, portable and floor care home appliances, and suppliers to the industry. AHAM's membership includes over 150 companies throughout the world. In the U.S., AHAM members employ tens of thousands of people and produce more than 95% of the household appliances shipped for sale. The factory shipment value of these products is more than \$30 billion annually. The home appliance industry, through its products and innovation, is essential to U.S. consumer lifestyle, health, safety and convenience.

We have reviewed the regulatory proposal and Initial Statement of Reasons for the proposed rulemaking by the Office of Environmental Health Hazard Assessment (OEHHA) and respectfully offer the following specific comments on the current proposal.

I. Overview

Prop 65 enacted into law the Safe Drinking Water and Toxic Enforcement Act of 1986 (the Act) which states that the people of California declared their right "to be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm." Prop 65 was intended, in part, to create a

¹ OEHHA's proposal includes a *Proposed Repeal of Article 6 and Adoption of New Article 6 Regulations for Proposition 65 Clear and Reasonable Warnings & Proposed Adoption of Section 25205, Proposition 65 Lead Agency Website* (together, "proposed rulemaking" or "NOPR").

labelling scheme to help notify consumers of possible exposures to chemicals known to be associated with cancer and/or reproductive harm, often based on animal studies alone. A product that carries a Prop 65 warning, however, does not necessarily mean that the product violates any product safety standard, or poses an actual health risk. This point is not fundamentally understood by many members of the public, who often are confused and alarmed by the presence of a Prop 65 warning.

Consumers have the right to know what is in the products they use, but far more information is available today than in the pre-Internet days when Prop 65 was enacted. Information overload can be counter-productive and lead to poor decision-making. This is exactly the problem Prop 65 has created. Over time, Prop 65 warnings have proliferated, partly in response to private enforcement actions. The result is that many consumers who are not alarmed by Prop 65 warnings believe that they convey no meaningful information other than a decision to forestall a Prop 65 enforcement suit. Such over-warning is counter-productive, can result in “warning fatigue” and, ultimately, undermines the effectiveness of a Prop 65 warning. The California Supreme Court has recognized that over-warning dilutes the force of a warning and is counterproductive.²

As a result of these dynamics, Prop 65 has increased substantially the litigation costs and compliance burdens on industry without any corresponding benefit to public health or consumer awareness. Further, issues that should be addressed through open and transparent regulatory processes have been relegated to closed door settlement discussion with trial lawyers who wind up receiving the bulk of the settlement payments. Against this backdrop, in May 2013 the Governor announced Prop 65 reform goals that were intended to provide more meaningful information to the public, limit frivolous Prop 65 lawsuits and provide greater certainty for businesses.³

The proposed rulemaking, however, would not achieve these goals for the reasons discussed below. Further, OEHHA’s regulatory action would result in unintended consequences and increase litigation risks and compliance costs.

II. Alternative, Content-Based Approach for Certain Chemicals Would Increase Certainty, Reduce Compliance Costs and Increase Transparency

Prop 65 does not provide a method across a product type to determine the likelihood of a consumer coming into contact with a chemical and the duration and route of its possible exposure, all important factors in assessing whether a true hazard exist. Even if this information is made available to consumers, it would be inconsistent from product to product unless there are defined test methods, usage rates and acceptable exposure levels to avoid confusion that undermines the legitimacy and impact of Prop 65.

More meaningful Prop 65 reform can be achieved through the creation of concentration limits, at least for certain chemicals that have been the focus of Prop 65 litigation (e.g., lead and Phthalates). Such an approach has a scientific basis under existing federal and state product content restriction laws and would provide a clear guidance to industry on when to label, thereby facilitating compliance and reducing enforcement risks. In such a regime, repeatable, objective tests can be used to establish compliance with a concentration limit, thereby reducing compliance costs and business uncertainty. The appliance industry has substantial experience with devising such test methods.

² See *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal. 4th 910, 931-32 (Cal. 2004) (Against the benefits that may be gained by a warning must be balanced the dangers of overwarning and of less meaningful warnings crowding out necessary warnings, the problems of remote risks, and the seriousness of the possible harm to the consumer).

³ See Press Release, Office of Governor Edmund G. Brown, Jr., Governor Brown Proposes to Reform Proposition 65. (May 7, 2013), [available here http://gov.ca.gov/news.php?id=18026](http://gov.ca.gov/news.php?id=18026) (last accessed Feb. 24, 2015).

OEHHA should establish safe harbor levels based on content (in parts per million) rather than exposure rates. Should OEHHA not provide a content-based exposure threshold, then chemicals should not be added to the Prop 65 list until a method is developed to test for the chemical. As part of this test method, there needs to be a consistent understanding of the usage of the product. The usage is important to understanding how a product is used and if contact with the Prop 65 chemical is even possible. For example, is a product used for five minutes, once a month or for one hour, once a day? These three examples result in very different levels of exposure. As another example, the Prop 65 safe harbor level for lead has a Maximum Allowable Dose Level of 0.5 µg/day, but that needs to include what the assumed exposure rate is in a day and how much lead may be in the product, which will vary from product to product, otherwise it is ripe for frivolous litigation. Furthermore, usage rates differ from product to product, and this should be reflected in how exposure levels are measured.

III. § 25205 Lead Agency Website

The regulatory proposal includes a public, government-hosted website, which includes information disclosure requirements that exceed OEHHA's delegated authority under the Act. The fact that this provision, for now, would not be enforceable under section 25249.6 of the Act does not cure this regulatory overreach. Further, the website would result in undue consumer confusion with no corresponding public health benefit, have an adverse economic impact, and increase frivolous litigation risk.

Exceeds OEHHA's Statutory Authority: Under Section 25249.12 of the Act, OEHHA is authorized to "adopt and modify" regulations as necessary to conform with and implement Prop 65's requirements for warning labels. The proposal for a lead agency website goes well beyond labeling. It would require the manufacturer, producer, distributor, or importer of a product to provide information, when reasonably available, concerning the concentration and location of chemicals within a product, as well as estimate the level of exposure to the chemical or chemicals. See Section 25205(b)(5)-(6) & (9). The Act neither compels nor authorizes such broad information disclosure nor requires the exposure assessments that would be necessary as a practical matter to comply with such requests.

Potential for Consumer Confusion: The proposed lead agency website also fails to advance the purposes of the Act because the information is unlikely to be useful to consumers. Providing the public with better and more accurate information on possible chemical exposures is a laudable policy goal; however, the regulatory proposal does not achieve this goal. How will information regarding a possible chemical exposure to diesel engine exhaust better inform consumer choice or risk-reduction behavior? How will consumers act on low-level exposure information generally, given the present scientific disputes on the safety and health effects of many of the Prop 65 chemicals? Prop 65 does not provide any hierarchy on the relative health risks of the listed chemical nor does the regime provide a simple way to convey that infrequent and low-level exposures to a listed chemical do not present the same degree of potential risk as chronic, high-dose exposures. Consequently, people who read the warnings have no meaningful way to prioritize which possible exposures should be avoided. The regulatory proposal does not address this total absence of risk prioritization and, as drafted, the proposed website provision would not assist citizens with making evidence-based, risk reduction decisions.

Adverse Economic Impact: In its economic impact analysis, OEHHA concluded that the proposed website will not have a significant statewide adverse economic impact. This conclusion is apparently based, in part, on OEHHA's misplaced belief that businesses should have access to scientifically valid chemical exposure information.⁴ We respectfully disagree with OEHHA's analysis because of the

⁴ See OEHHA's Initial Statement of Reasons, Proposed Adoption of Article 2, at pp. 6-7 (Jan. 16, 2015).

complexity and substantial costs associated with generating a scientifically valid chemical exposure assessment. Chemical exposure assessments require the consideration of different assumptions concerning individuals and populations, dose, route and administration, and duration of a given chemical exposure.⁵

A recent Prop 65 court ruling shows that complex expert analysis is necessary to complete a chemical exposure assessment and defend an alleged violation of Article 6.⁶ The same lawsuit addressed how the safe harbor limit for lead exposure should be determined based on average exposure and not a theoretical maximum daily exposure. As the recent Prop 65 litigation established, companies do not routinely conduct complex chemical exposure assessments, nor does the Act require them to. The reality is many businesses opt to provide a Prop 65 warning because of the: i) cost and complexity of undertaking a valid chemical exposure assessment; ii) absence of safe harbor levels for many Prop 65 chemicals; or iii) Prop 65 litigation risks. If adopted, the website provision would undoubtedly result in substantial compliance costs that would pose an adverse economic impact on many businesses.

Finally, trade associations are not in a position to furnish product exposure information. They often lack such expertise and the product-specific, proprietary information necessary for undertaking such assessments.⁷ Regulated businesses, not trade associations, will bear the adverse economic impact of the proposed lead agency website.

Frivolous Litigation Risks: OEHHA believes that by relocating the proposed lead agency website provision to Article 2 of the Act, it has taken reasonable steps to reduce the potential for frivolous private litigation—an important Prop 65 policy reform objective. However, the proposed website leaves unanswered several questions about how private plaintiffs would use the website information in lawsuits brought under other common law causes of action. For example, how will private plaintiffs use evidence of a firm unwilling or unable to furnish the requested information to OEHHA? If private persons dispute the estimated level of exposure information, could that result in private litigation? The current regulatory proposal fails to adequately address these legitimate concerns.

For all these reasons, we urge OEHHA to drop the lead agency website from the proposed regulatory action.

IV. §25603 Product Exposure Warnings – Method of Transmission

Currently, Prop 65 permits the transmission of a Prop 65 warning label via several methods, including by supplying a warning that appears on a product’s label or “other labeling”. 27 Cal. Code Reg. § 25603.1(a). The phrase “other labeling” includes printed material that accompanies a product, its container, or wrapper, such as an owner’s manual that accompanies a consumer product.

In the proposed regulations, however, the section on the methods of transmitting a warning provides, “A label on the product that includes all the elements specified in Section 25604.” (see § 25603(3)). The proposal deletes the phrase, “or other labeling” from this subsection. We strongly urge OEHHA to modify the proposed regulation to retain the method of furnishing a Prop 65 warning via “other labeling” that accompanies the product. This is a sensible method –indeed, for products that are small in size, the

⁵ See EPA Guidelines for Exposure Assessment, 57 Fed. Reg. 22,888-22,938 (May 29, 1992), available here <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=15263> (last accessed March 3, 2015).

⁶ See *ELF v. Beech-Nut Nutrition Corp.*, No. RG11597384 (Alameda Cnty. Cal. Super. Ct. July 31, 2013).

⁷ See fn 2 at p. 3.

only method -- of transmitting many types of warning information, often as required by voluntary industry standards.

Suggested revision to proposed subsection 25603(a)(3) in bold and capitalized –

(3) A label on the product **OR OTHER LABELING** that includes all the elements specified in Section 25604.

V. §25604 Product Exposure Warnings – Content

OEHHA is proposing that the warning would need to include a symbol with colors. We have concerns with this proposal. It is very costly to add colors to printing and it is unclear what benefit would be derived from these additional costs. We question the need for both a symbol and the text “warning” on a label where, given limited space, messages need to be prioritized and redundancy minimized or eliminated.

VI. §25600 General

Although OEHHA is proposing a two year transition period, there is now real “sell through” period for products, especially durable products. Durable products could be sold a few years after the date it is manufactured. As is the case with minimum energy standards, the date of manufacture for the product should be the determining factor on whether the “old” warning label can be used. As an example of the problems if you do not do this, is when Mexico did not provide a proper sell through and then expect that every product, on every single shelf, in every single store, in every single town would go hand-by-hand and add a label. The costs and time is extraordinary and unrealistic.

AHAM appreciates the opportunity to comment on the proposed Prop 65 regulations and would be glad to discuss further these important public policy issues. Please contact me or Kevin Messner at (530) 309-5629 or kmessner@politicallogic.net with any questions.

Sincerely,



Robert D. McArver
Vice President, Policy & Government Relations